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No. 85-1621

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

HON YIP Known as YIP HON,

Petitioner,

—v.—

CLINTON L. PAGANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent opposes the granting of certiorari on one ground only. He argues that State law, not Federal law, determines whether one who made a statement to a Congressional Subcommittee has an absolute privilege to defame.

However, Federal law should be applied to determine whether or not to accord privilege. This is because uniquely Federal interests are involved, particularly with respect to the effective functioning of the Congress. If it were otherwise, the granting of privilege would be uncertain and left to the vagaries of the laws of the several States. It would lead to great diversity in results.

Respondent's argument that State law governs is based on this being a diversity case. Respondent is in error.

It is the source of the right sued on, and not the basis of Federal jurisdiction, which determines the law governing a

particular case. The source of the right sued on was the Congressional Subcommittee Hearing. The defense of absolute privilege was claimed because the statements were made at such Congressional Hearing. The circumstances under which the statements were made determine the issue of whether the absolute privilege is to be accorded.

Thus, the source of the right and the circumstances under which the defamatory statements were made, require determination of the issue under Federal law.

Although Respondent now argues that State law should control, it is the Respondent who, in his answer to the complaint, alleged as an affirmative defense:

> "All relevant statements were made by defendant during the course of official proceedings of the House of Representatives' Subcommittee on Crime of the Committee on the Judiciary and are therefore absolutely privileged * * *." (Record pages 32-33)

This, no doubt, prompted the Congressional Leadership Group of the United States House of Representatives to move for leave to appear as *amicus curiae.* In its motion of January 25, 1985 to the District Court for leave to appear, the Congressional Group stated that Respondent had appeared before the Congressional Subcommittee where he made the defamatory statements which are the subject of the action. In support of its motion, the Congressional Group wrote:

> "The Court's ruling may have a significant effect on the legal principles governing Congressional witnesses."

Subsequently, in its brief to the Third Circuit Court of Appeals, the Congressional Group stated:

> "Because of the paramount federal interest in Congress's obtaining information, the absolute privilege of Congressional witnesses should be a matter of federal law * * *." (Brief of Congressional Group dated September 3, 1985, page 7, note 8).

An additional factor demonstrating the need for the application of Federal law is that "Committees of the House of Representatives hold more than three thousand hearings a year." (Brief of Congressional Group dated September 3, 1985 at page 16). This, too, should be considered by the Court.

Respondent, at page 4 of his brief, states that Petitioner "did not appeal the holding that the issue was governed by state law." Respondent is in error. Petitioner did not appeal from that part of the judgment of the District Court which granted leave to the Congressional Group to appear. Petitioner did appeal from the balance of the judgment which dismissed his complaint and thus brought up for review all issues decided by the District Court and which are the bases of the petition for the writ of certiorari.

CONCLUSION

The importance and substantiality of the questions presented have not been denied. The need for plenary review is indisputable. The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 8, 1986

Respectfully submitted,

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